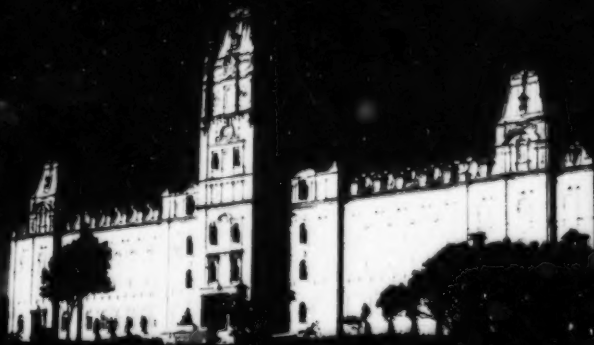


QUÉBEC'S POLITICAL AND CONSTITUTIONAL STATUS



A N O V E R V I E W

ASSEMBLEE NATIONALE
RECU

00 AVR 19 13:33

QUÉBEC'S POLITICAL AND CONSTITUTIONAL STATUS

A N O V E R V I E W

Production of this document was coordinated by the Secrétariat aux affaires intergouvernementales canadiennes of the ministère du Conseil exécutif.

Publishing of the document was coordinated by the Service des communications of the ministère du Conseil exécutif.

Graphic design: Deschamps Design

Printing: Imprimerie Provinciale inc.

Cover page: Parliament Building — Québec
Louise Leblanc

This document may not be reproduced in whole or in part unless the source is acknowledged.

Legal deposit — 1999
Bibliothèque nationale du Québec
ISBN 2-550-34972-5

© Gouvernement du Québec

This study presents the key events pertaining to the question of Québec's political and constitutional status.

These events reflect, in particular, a change in the federal system that has gradually shifted away from the principle of Canadian duality and respect for the autonomy of the provinces to a system more closely resembling a unitary state. After more than 130 years, the experience of federalism has hardly been conclusive for Québec. The unilateral adoption of the 1982 Constitution that imposed an amending formula and curtailed the powers of the Québec National Assembly in matters of language and education without Québec's consent sounded the death knell of the compromise established in 1867 between the two founding peoples that led to the birth of the Canadian federation. Québec has still not adhered to the 1982 Constitution. To this day, the constitutional reform proposals put forward to remedy this situation have all failed.

The shift in the federal system toward a unitary state is wholly incompatible with the quest for more autonomy that Québec has steadfastly pursued since the early 1960s through its demand for a political status more in tune with its reality as the only predominantly French-speaking people in North America.



After over 35 years of democratic debate, the stalemate persists over Québec's political and constitutional future. The deadlock has been exacerbated by two irreconcilable viewpoints, that of English Canada centred on an omnipresent central government and the equality of the provinces, and that of Québec,

centred on respect for its autonomy and specificity.

The current Québec government deems democratic accession to sovereignty to be the only option likely to break the present deadlock by allowing for a redefinition of the political relations between Québec and Canada in which they are equals. The Québec sovereignty project is resolutely in favour of free trade and open to the world. It expresses the Québec people's determination to assert its identity and to directly promote the cause of cultural diversity in the international realm.

A handwritten signature in dark ink, appearing to read 'J. Facal'. The signature is stylized with a large, flowing 'J' and a cursive 'Facal'.

Joseph Facal

Minister responsible for
Canadian Intergovernmental Affairs



TABLE OF CONTENTS

INTRODUCTION	7
PRIOR TO THE FEDERATION:	
FROM THE CONQUEST TO THE <i>ACT OF UNION</i>	9
The Royal Proclamation of 1763 and the <i>Quebec Act</i> of 1774	9
The <i>Constitutional Act, 1791</i> and the establishment of Lower Canada	10
The <i>Act of Union, 1840</i>	11
QUÉBEC AND THE CANADIAN FEDERAL SYSTEM	13
Confederation of 1867	13
The quest for equality and affirmation	17
Calling into question the federal framework: equality through sovereignty-association	20
ATTACK ON DUALITY AND INABILITY TO ACCOMMODATE QUÉBEC	23
The 1982 rupture	23
ATTEMPTS AT REDRESS	27
Failure of the Meech Lake Accord	27
The Commission on the Political and Constitutional Future of Québec	29
The Charlottetown Accord	30
1995 REFERENDUM AND SUBSEQUENT EVENTS	33
Distinct society and unique character	33
The federal government's reference on Québec's right to accede to sovereignty	36
Social Union Framework Agreement	38
CONCLUSION	43



INTRODUCTION

The Canadian Constitution does not recognize the existence of the Québec people. Yet, a national community that developed from the settlement of New France participated in the foundation of the Canadian federation and was at the centre of various pre-Confederation

constitutional arrangements in colonial Canada from the beginning of the British regime. The presence of this community in British North America has affected the events that have punctuated Canada's political and constitutional history.



PRIOR TO THE FEDERATION: FROM THE CONQUEST TO THE ACT OF UNION

The territory whose political boundaries would eventually be modified to become modern-day Québec and the home of the Québec people had a population of roughly 65 000 at the time of the British conquest in 1760. These descendants of the 10 000 French colonists who settled in Québec in the 17th and 18th centuries formed "a national community and a homogeneous sociological entity clearly characterized by its culture."¹

THE ROYAL PROCLAMATION OF 1763 AND THE QUEBEC ACT OF 1774

Following the conquest of 1760 and the subsequent ceding of New France to Britain at the end of the Seven Years' War, the new British colony was given its first institutional framework. The colony became the Province of Quebec as a result of the Royal Proclamation of 1763, which replaced the military regime established after the conquest with a civilian government. Under the new regime, French law was abolished, as the Royal Proclamation contained no explicit guarantees concerning the laws and customs of the new

colony's inhabitants. This situation was remedied in 1774, in response to demands from the people, with the *Quebec Act*, which restored French civil law, guaranteed freedom of religion and replaced the *Test Oath*, which excluded Catholics from public office. Political scientist Gérard Bergeron describes the importance of the *Quebec Act* in these terms:

*Even before the society formed by the new occupiers had firmly established itself, the Canadiens saw the secular foundation of their own society achieve a form of official status under the new regime and, as a result, consolidated for the future.*²

The adoption of this first truly constitutional document sparked debate in Westminster. Historian Jacques Lacoursière has noted that the question of French civil law and the even limited recognition of Catholicism aroused opposition from a number of British parliamentarians.³

1. Québec, *Report of the Royal Commission of Inquiry on Constitutional Problems*, Volume II, Part Three, 1956, p. 30.

2. Gérard Bergeron, *Pratique de l'État au Québec*, Montréal: Québec/Amérique, 1984, p. 32.

3. Jacques Lacoursière, *Histoire populaire du Québec — Des origines à 1791*, Tome 1. Sillery: Les éditions du Septentrion, 1995, p. 384.

THE CONSTITUTIONAL ACT, 1791 AND THE ESTABLISHMENT OF LOWER CANADA

The Constitution established by the *Quebec Act* did not address the needs of the Loyalists, who fled the American Revolution and whose arrival in large numbers modified the situation of the inhabitants of the "Province of Quebec," a very particular colony within the British Empire in North America. The Loyalists had trouble adapting to their new environment among the French-speaking, Catholic inhabitants of their province of adoption, who still accounted for 85% of the population. Aside from the inhabitants' language and religion, their institutions, civil law and culture were entirely foreign to the Loyalists. The new minority's position promptly encouraged the British government to advocate a new Constitution for the Province of Quebec.⁴

The *Constitutional Act, 1791* divided the Province of Quebec into Upper Canada, centred around Kingston, where a majority of colonists of British origin and of Loyalists lived, and Lower Canada, centred around the St. Lawrence Valley,

still occupied by a predominantly French-speaking population.

In Lower Canada, French-speakers were able to assert their political presence through their participation in the new elected assembly. However, their political influence was limited by the absence of responsible government. The elective regime and bicameral parliament adopted in each of the two new provinces were accompanied by a concentration of power in the Executive Council, whose members were appointed by and acted under the authority of the Governor, who in turn was appointed by the British government.

Because of their numerous shortcomings, especially the absence of genuine control exercised by assembly members over public spending, the institutions of 1791 aroused widespread discontent. The pre-federation regime implemented by this constitutional change nonetheless confirmed French Canada's distinctive character in the British colonies and fostered the development of Québec parliamentarism.

4. Gérard Bergeron, *supra* note 2, p. 32.

In 1831, the great political thinker Alexis de Tocqueville made the following observation about the French-speaking population living in Lower Canada: "[it] has its government and its own Parliament. It truly forms a distinct nation."⁵ Not only did Lower Canada have its own language, religion and customs, Tocqueville noted, but it also already had its own laws and institutions.

THE ACT OF UNION, 1840

The forced union of Lower and Upper Canada into a single political entity, the Province of Canada, hardly aroused enthusiasm in French Canada. The union was implemented in response to a recommendation by Lord Durham following the latter's examination at the behest of the British government of the political situation in Lower Canada, which was shaken by upheavals in 1837 and 1838. The union, as contemplated in the Durham Report, was intended to ensure that the English-speaking population of Lower Canada was not subject to the will of the French-speaking majority:

A plan by which it is proposed to ensure the tranquil government of Lower Canada, must include in itself the means of putting an end to the agitation of national disputes in the legislature, by settling, at once and forever, the national character of the Province. I entertain no doubts as to the national character which must be given to Lower Canada; it must be that of the British Empire; that of the majority of the population of British America; that of the great race which must, in the lapse of no long period of time, be predominant over the whole North American Continent. Without effecting the change so rapidly or so roughly as to shock the feelings and trample on the welfare of the existing generation, it must henceforth be the first and steady purpose of the British Government to establish an English population, with English laws and language, in this Province, and to trust its government to none but a decidedly English Legislature.

[...]

5. *Tocqueville au Bas-Canada*, texts presented by Jacques Vallée. Montréal: les Éditions du Jour, 1973, p. 104.

*I believe that tranquillity can only be restored by subjecting the Province [of Lower Canada] to the vigorous rule of an English majority; and that the only efficacious government would be that formed by a legislative union.*⁶

The new Constitution came into force in February 1841. Lower Canada lost its own parliamentary institutions and, while they formed a majority of the population, French Canadians were a minority in the institutions of United Canada. Moreover, English was made the only official language of government institutions. For the first time in a constitutional text, French was banned. However, these provisions were abrogated by the British Parliament in 1848.

Two nations made up United Canada, one French-speaking and mainly Catholic, the other English-speaking and mainly Protestant. Institutions adapted to the presence of the two distinct national communities. The quest for responsible government gave reformists from the two former provinces an opportunity to join forces and contemplate for the

legislative assembly a dual leadership which will become "the instrument of a political dualization in United Canada based on nationalities."⁷ Indeed, a double majority rule came to prevail under which any legislative measure had to rally simultaneous majorities among the parliamentarians from Canada East (formerly Lower Canada) and Canada West (formerly Upper Canada) in order to be adopted.

6. U.K., *Report on the Affairs of British North America, from the Earl of Durham*, 11 February 1839, pp. 288-289, 307.

7. Gérard Bergeron, *supra* note 2, p. 37-38.

QUÉBEC AND THE CANADIAN FEDERAL SYSTEM

CONFEDERATION OF 1867

Around 1860, the two nations that made up United Canada were both eager to change the political system that had been imposed on them 20 years earlier, but one could not act independently of the other:

Whether we ask for parliamentary reform for Canada alone or in union with the Maritime Provinces, the French Canadians must have their views consulted as well as us. This scheme can be carried, and no scheme can be that has not the support of both sections of the province.⁸

During parliamentary debate on Confederation in United Canada, the key players in the creation of the new federation emphasized the importance for French Canadians to adopt a regime that would be federal in nature and that would allow for the development of their own identity. Étienne-Paschal Taché, Prime Minister of United Canada, stated when he presented the proposed Confederation on behalf of the government:

[L]ower Canada had constantly refused the demand of Upper Canada for representation according to population, and for the good reason that, as the union between them was legislative, a preponderance to one of the sections would have placed the other at its mercy. It would not be so in a Federal Union, for all questions of a general nature would be reserved for the General Government, and those of a local character to the local governments, who would have the power to manage their domestic affairs as they deemed best. If a Federal Union were obtained it would be tantamount to a separation of the provinces, and Lower Canada would thereby preserve its autonomy together with all the institutions it held so dear, and over which they could exercise the watchfulness and surveillance necessary to preserve them unimpaired.⁹

John A. Macdonald, leader and Attorney General of Canada West, also recognized that a unitary state, i.e. the "legislative union" in the political parlance

8. *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 8th Provincial Parliament of Canada, 3rd Session. Québec: Hunter, Rose & Co., 1865, p. 87 [hereinafter *Confederation Debates*].

9. Speech of February 3, 1865, *Confederation Debates*, p. 9.

of the time, would be unacceptable to French Canadians and unsuited to their situation:

[W]e found that such a system [the legislative union] was impracticable. In the first place, it would not meet the assent of the people of Lower Canada, because they felt that in their peculiar position — being in a minority, with a different language, nationality and religion from the majority, — in case of a junction with the other provinces, their institutions and their laws might be assailed, and their ancestral associations, on which they prided themselves, attacked and prejudiced; it was found that any proposition which involved the absorption of the individuality of Lower Canada [...] would not be received with favor by her people.¹⁰

George-Étienne Cartier, Attorney General for Canada East during the negotiations on Confederation and the principal leader of French Canada, believed that the adoption of a federal system would recognize the French-Canadian nationality:

Such is [...] the significance that we must attach to this constitution, which recognizes the French-Canadian nationality. As a distinct, separate nationality, we form a State within the State with the full use of our rights and the formal recognition of our national independence.¹¹

In 1956, the Royal Commission of Inquiry on Constitutional Problems set up by the Québec government noted that the events leading up to the federation revealed that:

[T]he French Canadians only gave this necessary support [in favour of Confederation] on two clear conditions — that the union should be federative and that, in this union, they should be recognized as a distinct national group and that they should be placed on the same footing as the other ethnic group.¹²

Confederation was perceived in some political and constitutional thinking in Québec as a pact between two founding peoples:

10. Speech of February 6, 1865, *Confederation Debates*, p. 29.

11. *La Minerve*, Montréal, July 1, 1867.

12. *Report of the Royal Commission of Inquiry on Constitutional Problems*, *supra* note 1 at 140.

This interpretation of Confederation as a pact still astonishes English-speaking Canadians, for whom the 1867 Act can only be an act of the British Parliament, whose exegesis must adhere strictly to legal texts, which make no specific reference whatsoever to any pact. Be that as it may, what is sociologically significant and important is that French Canadians, from roughly the end of the 19th century onward, have attributed this significance to the Canadian Constitution. [...] Whether or not English-Canadian publicists and jurists find it acceptable, it will persist as one of the most tenacious components of the definition that French Canadians give of the history of their Canada.¹³

While this dualistic conception of the country was contested in the rest of Canada, it expressed, as a basic political idea, a desire by French Canada to be associated as a full-fledged partner and participant in the development of the new country:

After 1867, French-speaking Canadians long hoped to impose a dualistic interpretation of the Constitution, i.e. one based on the principle of the equal association of the "two founding peoples."¹⁴

Confederation was also perceived as a pact between the provinces, a perception that conflicted with the conception of the Canadian Constitution as, first and foremost, British imperial law. In 1884, Québec Prime Minister Honoré Mercier denounced the federal government's frequent infringements on the provinces' prerogatives by invoking the pact:

The existence of the provinces preceded that of the Dominion and it is from the provinces that the latter received its powers. The provinces had responsible government in 1867: they had their own legislatures, laws and the autonomy inherent in a colony. The provinces delegated, in the general interest, a portion of their powers. Those powers that they did not delegate they kept and still possess. They are sovereign

13. Jean-Charles Falardeau, "Les Canadiens français et leur idéologie" in Mason Wade (ed.), *Canadian Dualism / La dualité canadienne*. Toronto: University of Toronto Press and Québec: Les Presses de l'Université Laval, 1960, 20-38, p. 25.

14. José Woehrling, "La Constitution canadienne et l'évolution des rapports entre le Québec et le Canada anglais, de 1867 à nos jours" in Centre d'études constitutionnelles, *Points de vue/Points of View*, No. 4, 1993, p. 13.

within the limits of their jurisdiction and any attack on this sovereignty is a violation of the federal pact.¹⁵

Maurice Duplessis, another Prime Minister recognized for his ardent defence of Québec autonomy against the centralizing designs of the federal government, frequently defended Québec's constitutional prerogatives by invoking the 1867 pact:

Our system of government is based on the principle of the complete autonomy of the provinces. There are very good reasons for this, the most important one being that Canadian Confederation, since its inception, not only constitutes an agreement between the four founding provinces but a sacred pact concluded between the two great races whose friendly, fair cooperation is essential to Canadian unity. [...] Confederation should be what the Fathers of Confederation wanted, in good faith, it to be, i.e. an association of provinces sovereign within the limits of their jurisdiction and a federal

government sovereign within the limits of its jurisdiction. [...] The Province of Québec would never have agreed to join Confederation had it not then been perfectly clear that the guarantees on which Confederation was based were intangible.¹⁶

The notion of the pact between the provinces centres, in particular, on the theory of the existence and survival of the political entities that reached agreement in 1867, as expressed in an opinion rendered in 1892 by the Judicial Committee of the Privy Council in London, which then served as the court of last resort for Canada:

The object of the Act [of 1867] was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. [...] [T]he Dominion

15. Speech given by Québec Prime Minister Honoré Mercier before the Québec Legislative Assembly, April 7, 1884, reproduced in J.O. Pelland, *Biographie, discours, conférences, etc. de l'hon. Honoré Mercier*, Montréal, 1890, 397-437, p. 399.

16. Speech by Québec Prime Minister Maurice Duplessis given at the opening of the Federal-Provincial Constitutional Conference, Ottawa, January 10-12, 1950. Duplessis repeated these remarks at the federal-provincial conferences held in September and December 1950 and at the November 1957 federal-provincial conference.

*Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before the passing of the Act.*¹⁷

This confirmation by the Privy Council did not prevent the federal government from intervening in fields under provincial jurisdiction.

THE QUEST FOR EQUALITY AND AFFIRMATION

Since 1867, Québec's importance as the fulcrum of the French-Canadian nation has continued to grow. In the mid-20th century, over 80% of French Canadians were concentrated in Québec. After 1960, during the Quiet Revolution,

Québec displayed an unflagging willingness to assume responsibility for sectors of decisive importance to its cultural, social and economic development. Moreover, Québec's determination to assert itself was apparent at the international level with the development of a network of foreign delegations and a policy of direct international initiatives promoted by Paul Gérin-Lajoie, Minister of Education in the Lesage government. When explaining this policy, Mr. Gérin-Lajoie noted that:

Québec is not sovereign in all fields: it is a member of a federation. However, from a political standpoint, it forms a State. It possesses all the attributes of a State, i.e. territory, population and autonomous government. In addition, it is the political expression of a people that is distinct in many ways from the English-speaking communities inhabiting North America.

Québec has its own mission on this continent. French Canada is the biggest French-speaking community

17. *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437, pp. 441-442.

*outside France and it belongs to a cultural universe centred in Europe, not in North America. Consequently, Québec is more than a simple federated State among others. It is the political instrument of a distinct, unique cultural group in North America.*¹⁸

During the 1960s, the Royal Commission on Bilingualism and Biculturalism received a mandate to examine the question of the equality of the two founding peoples:

*From the outset we have believed this to be the mainspring of our terms of reference. We were not asked to consider merely the recognition of two main languages and cultures which might be granted entirely different rights; we were asked to examine ways in which the Canadian Confederation could develop, in accordance with the principle of equal partnership.*¹⁹

The Confederation of 1867 proved to be a framework that did not ensure that equality of the founding peoples. In Québec, this observation and the desire for greater political autonomy sparked demands for sweeping constitutional changes involving a reform of Québec's constitutional status:

*I have often stated what Québec, as the focal point of French-speaking Canada, wants. We want the equality of the two ethnic groups that founded this country, we want to assert ourselves in a manner suited to our culture and our aspirations, and we want a status in the Canada of the future that respects our specific traits.*²⁰

The 1966 election campaign slogan, "Equality or independence," put forward by the winning party, came to symbolize Québec's quest for equality. Daniel Johnson, who became the Prime Minister of Québec, summarized it in these terms:

18. Speech by Education Minister Paul Gérin-Lajoie to members of the consular corps in Montréal, April 12, 1965.

19. Canada, *Report of the Royal Commission on Bilingualism and Biculturalism*, Book 1, 1967, p. xxxix. The mandate adopted by the federal government requested that the Royal Commission "[...] inquire into and report upon the existing state of bilingualism and biculturalism in Canada and to recommend what steps should be taken to develop the Canadian Confederation on the basis of an equal partnership between the two founding races, taking into account the contribution made by the other ethnic groups to the cultural enrichment of Canada and the measures that should be taken to safeguard that contribution [...]." [Emphasis added] *Ibid.*, p. 173.

20. Speech by Québec Prime Minister Jean Lesage given before the Canadian Club in Calgary, September 22, 1965.

[A new] Constitution should [...] be designed in such a way that Canada is not solely a federation of 10 provinces but a federation of two nations that are equal in every respect.

[...]

Whether we opt for a federation, associated States, a confederation, special status or a republic, the new constitutional regime must give the French-Canadian nation all of the powers it needs to fully assume its destiny.

After three centuries of labour, our nation fully deserves to live freely. So much the better if it feels at home from coast to coast, which implies recognizing its full equality.²¹

During the Quiet Revolution and in subsequent years, at a time when decolonization favoured by the right to self-determination spawned a number of national emancipation movements, the French-Canadian nation, increasingly concentrated in Québec, completed its integration of the notion of territory into

its reflection on the collective future of French Canadians. While they were a minority in Canada, they were nonetheless a majority in Québec, where they felt better able to achieve their emancipation and build their own society, to the extent that they began to conceive of themselves differently:

In recent years, [...] more and more have adopted the name and identity of Québécois, underlining this sense of themselves as a majority, as a people.²²

However, all of the proposals aimed at reflecting Québec's national character in the Constitution have faltered or failed. This is true, in particular, of the special status sought during the 1960s and the asymmetrical federalism proposed by the Task Force on Canadian Unity (Pépin-Robarts Report) in the late 1970s. The same was true of the concept of a distinct society sought during the 1980s, until 1992. Historian Jean-Louis Roy, when examining constitutional debate between 1960 and 1976, wrote:

21. Daniel Johnson, *Égalité ou indépendance*. Montréal: Éditions Renaissance, 1965, pp. 116 and 123.

22. Canada, The Task Force on Canadian Unity, *A Future Together. Observations and Recommendations*, January 1979, p. 25.

The most decisive event since 1960 in the relationship between Québec and Canada was the broad acceptance by a majority of Quebecers of the status of a nation for their society. The refusal by English Canada, or at least its federal and provincial spokespersons, to recognize this fact precipitated a psychological rupture in Canada. This refusal undoubtedly explains why no new constitutional proposal likely to rally Quebecers has come from English Canada.

[...]

English Canada's refusal to recognize that Québec society constitutes a nation, after over 10 years of constitutional negotiations, is the main reason for the fragmentation of Canada.²³

CALLING INTO QUESTION THE FEDERAL FRAMEWORK: EQUALITY THROUGH SOVEREIGNTY-ASSOCIATION

In 1976, debate took a new turn with the coming to power in Québec of the government of René Lévesque, which

proposed a referendum on sovereignty-association, a proposal that called for a new Québec-Canada agreement outside the federal framework.

As a first step, the Québec National Assembly adopted, in 1978, the *Referendum Act*, which established a Québec referendum process. One of its features is the establishment of "umbrella committees," called national committees, which assemble the proponents of the different options put to referendum. This system plays a key democratic role, in particular in controlling referendum spending.

All the referendums on Québec's political future have been held under this legislation. The first one, organized by the Lévesque government, was held on May 20, 1980, on the question of sovereignty-association.

Members of the federal government and a number of provincial premiers participated actively in the No campaign during that referendum. In 1992, federal Liberal MP Brian Tobin noted in the House of Commons that:

23. Jean-Louis Roy, *Le choix d'un pays: le débat constitutionnel Québec-Canada 1960-1976*. Montréal: Leméac, 1978, pp. 323-324.

[I]n 1980 the government of the day, indeed all members of Parliament of the day in this Chamber participated in a referendum process, participated under an umbrella organization and participated in a referendum in the province of Quebec where there were spending limits. That is the reality and that is the last word on referendums in Canada.²⁴

Joe Clark, then Leader of the Official Opposition in the federal Parliament, stated that his participation in the 1980 referendum campaign supposed the recognition of the legitimacy of the exercise.²⁵ Pierre Elliott Trudeau, then Prime Minister of Canada, solemnly promised just before the referendum vote to renew Canadian federalism if the No side won.

In the May 20, 1980 referendum, 59.56% of the valid ballots were cast in favour of the No side and 40.44% in favour of the Yes side. Québec Prime

Minister René Lévesque drew the following conclusions from the first referendum organized by Québec institutions:

Manifest recognition [of the right to self-determination] is the most valuable outcome of the Québec referendum. Regardless of the result, it is now undisputed and indisputable that Québec is a distinct national community that may choose of its own accord, without outside intervention, its constitutional status. Quebecers may decide to remain in the Canadian federation, just as they may decide democratically to leave it if they believe that this system no longer satisfies their aspirations and needs. This right to directly control one's national destiny is the most fundamental right that the Québec collectivity possesses.²⁶

24. Canada, *House of Commons Debates* (14 May 1992) at 10726.

25. Chantal Hébert, "Une nouvelle démission secoue les conservateurs; les militants confirment le droit à l'auto-détermination", *Le Devoir*, August 10, 1991; see also Graham Fraser, "Tories back Quebec's right to choose", *Globe and Mail*, August 10, 1991.

26. Notes for a speech by René Lévesque at the first ministers' meeting held in Ottawa on June 9, 1980, reproduced in Québec, *Ministère des Affaires Intergouvernementales, Commission de la présidence du conseil et de la consultation, Dossier sur les discussions constitutionnelles*, August 14-15, 1980.

ATTACK ON DUALITY AND INABILITY TO ACCOMMODATE QUÉBEC

THE 1982 RUPTURE

New constitutional negotiations were launched in the weeks following the referendum on sovereignty-association. Despite the federal Prime Minister's commitment designed to ensure the rejection of the Lévesque government's proposal, the negotiations culminated in the imposition on Québec of the most important constitutional changes made since the inception of the Canadian federation.

In the 1960s and the 1970s, one of the federal government's constitutional reform priorities was to repatriate the Canadian Constitution, which implied introducing into the Constitution an amending formula under Canadian control and the end of mandatory recourse to Westminster in this respect. Along with the question of repatriation, constitutional talks focused on several aspects of reform. Generally speaking, the question of Québec's status and its constitutional jurisdiction was a priority for Québec during these talks, in which several Québec governments participated actively.

However, the negotiations on constitutional reform undertaken after the 1980 referendum led to Québec's isolation on November 5, 1981, when it was the only province not to adhere to the constitutional amendments proposed by Ottawa and the other provinces. The amendments curtailed Québec's powers governing language and education and did not grant it a right of veto or the right to opt out with adequate compensation in respect of constitutional amendments. Québec expressed in vain its opposition to the proposed repatriation of the Constitution. In December 1982, the Supreme Court of Canada refused to acknowledge that Canadian constitutional conventions contain a right of veto for Québec, although Québec had in fact exercised such a veto on several occasions.

On November 5, 1981, Québec Prime Minister René Lévesque indicated Québec's determination to refuse the weakening of its position within the Canadian federation. The Québec National Assembly, in response to the amendment without Québec's consent of the agreement reached 114 years

earlier, adopted on December 1, 1981 a resolution establishing the conditions under which Québec would agree to adhere to the repatriation of the Constitution. This resolution, an excerpt from which is presented below, expressly demands that the Constitution recognize the equality of the two founding peoples and Québec as a distinct society possessing all of the attributes of a distinct national community:

The National Assembly of Québec, mindful of the right of the people of Québec to self-determination,

and exercising its historical right of being a full party to any change to the Constitution of Canada which would affect the rights and powers of Québec,

declares that it cannot accept the plan to patriate the Constitution unless it meets the following conditions:

1. It must be recognized that the two founding peoples of Canada are fundamentally equal and that Québec, by virtue of its language, culture and

institutions, forms a distinct society within the Canadian federal system and has all the attributes of a distinct national community.²⁷

However, the federal government refused to consider the Québec National Assembly resolution and, as a result, fully maintained the constitutional deadlock between Québec and the rest of Canada.

From a constitutional standpoint, Québec was condemned to the status quo. As political scientist Donald Smiley has noted:

In general, then, an exercise in constitutional review and reform whose alleged objectives were to create more harmonious relations between Quebec and the wider Canadian community has involved a betrayal of the Quebec electorate, a breach of fundamental constitutional convention, a recrudescence of Quebec nationalism, and an even more serious Quebec challenge than before to the legitimacy of the Canadian constitutional order.²⁸

27. Québec, National Assembly, *Votes and Proceedings*, No. 12 (1 December 1981) at 143.

28. Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982" in Keith Banting and Richard Simeon (ed.), *And No One Cheered: Federalism, Democracy and the Constitution Act*. Toronto: Methuen, 1983, 74-95, p. 78.

The unilateral adoption of the *Constitution Act, 1982*, which confirms the rejection by the federal government of the notion of two founding peoples and replaces it with the concept of "one State, one nation", has figured prominently in the Canadian constitutional landscape. Far from recognizing the Québec people, the *Constitution Act, 1982*, presents a new constitutional vision in which duality and Québec's specific character are not recognized:

The Constitution Act, 1982, [...] constitutionalized the principle of the preservation and enhancement of the multicultural heritage of Canadians, thus imposing on Québec a constitutional viewpoint which did not necessarily coincide with its reality within Canada: the latter was defined as a multicultural society, without constitutional recognition of the principle of "Canadian duality" and of Québec's distinctiveness. The multicultural Canadian society, being predominantly English speaking, can easily become indifferent to

Québec's distinct identity and its unique linguistic and cultural position in Canada.

[...]

[F]rom a Constitution based on a political compromise which earned the support of representatives of the French Canadians in 1867, Canada shifted in 1982 to a Constitution adopted despite the opposition of a province where nearly 90 percent of French-speaking Canadians live and which accounts for over one-quarter of Canada's population.²⁹

29. Québec, *Report of the Commission on the Political and Constitutional Future of Québec*, March 1991, pp. 29-30.



ATTEMPTS AT REDRESS

Following a change of government in Ottawa, the Québec government of René Lévesque made proposals in 1985 in order to put an end to the political and constitutional situation created by the unilateral adoption of the *Constitution Act, 1982*.³⁰ Brian Mulroney, the new federal Prime Minister, had committed himself, during the election campaign that brought him to power in 1984, to the objective of convincing the Québec National Assembly to assent to the new Canadian Constitution "with honour and enthusiasm."³¹

One of the key components of the constitutional proposal made by Québec was the explicit recognition of the existence of the Québec people. Moreover, this recognition was to be reflected in a number of other constitutional amendments, including a reform of the distribution of powers between the two orders of government. The federal government did not respond to these proposals.

The subsequent election of a Liberal government in Québec under Robert Bourassa initiated further constitutional negotiations. The government adopted

as its objective to restore the legitimacy of the Canadian constitutional framework by ensuring Québec's adherence to the *Constitution Act, 1982*. It stipulated five minimal conditions:

1. explicit recognition of Québec as a distinct society;
2. a guarantee of broader powers in the realm of immigration;
3. limitations on federal spending power;
4. recognition of Québec's right of veto over constitutional amendments affecting it;
5. Québec's participation in the appointment of Québec justices sitting on the Supreme Court of Canada.³²

FAILURE OF THE MEECH LAKE ACCORD

The minimum conditions put forward by the Bourassa government led to the 1987 Constitutional Accord, which reflected the terms of an agreement concluded at Meech Lake between

30. Québec, *Projet d'accord constitutionnel. Propositions du Gouvernement du Québec*, May 1985.

31. Notes for a speech by the Honourable Brian Mulroney, Sept-Îles, August 6, 1984.

32. See the *Allocution prononcée par le ministre délégué aux Affaires intergouvernementales canadiennes, M. Gil Rémillard, à l'occasion du Colloque "Une collaboration renouvelée du Québec et de ses partenaires dans la Confédération"*, Mont-Gabriel, May 9, 1986.

Québec, the federal government and the nine other Canadian provinces. Despite the unanimous agreement, ratified three times, between the eleven governments, the Accord did not receive within the three-year deadline prescribed by the constitutional amending formula the consent of the required number of provincial legislatures that would have led to its implementation.

The rest of Canada was unwilling to recognize in the Constitution the concept of a distinct society. The rejection of what was, for the Québec people, a historic compromise of five minimal conditions was perceived as the marginalization of its specificity within the Canadian federation. An additional proof was added of the major difficulty for Québec to obtain within the federal framework the levers deemed essential to the maintenance and development of its specificity.

According to Québec Prime Minister Robert Bourassa, the entire constitutional process was called into question:

If we can draw one conclusion from these negotiations, it is that the constitutional amendment process in Canada has been discredited. The Québec government refuses to return to the constitutional negotiating table.

[...]

Moreover, it is the position of my government to negotiate from now on with one interlocutor, not 11, to negotiate with the Canadian government, which represents the entire population of Canada; bilateral negotiations between the Québec government and the federal government.³³

As for the rejection of Québec's specificity following the failure of the Accord, Prime Minister Robert Bourassa, speaking in the National Assembly, sent the rest of Canada this message:

English Canada must clearly understand that, when all is said and done, Québec is now and will always be a distinct society, free and capable of assuming its destiny and development.³⁴

33. Message from Québec Prime Minister Robert Bourassa to Quebecers in the wake of the failure of the Meech Lake Accord, Québec City, June 23, 1990.

34. Québec, National Assembly, *Votes and Proceedings* (22 June 1990) at 4134.

THE COMMISSION ON THE POLITICAL AND CONSTITUTIONAL FUTURE OF QUÉBEC

Established on September 4, 1990 under the authority of the Québec National Assembly, pursuant to legislation adopted unanimously by all parties represented therein, the Commission was given the mandate to study and analyse Québec's political and constitutional status. The mandate reflected the observation made by Prime Minister Robert Bourassa and confirmed by the members of the National Assembly that the rejection of the Meech Lake Accord had called into question this status and created the need to redefine it. The extraordinary nature of the Commission was also reflected in its membership. Among the 36 members appointed by the National Assembly, 18 were not Members of the National Assembly and included two elected municipal representatives, three federal Members of Parliament from Québec and 13 individuals, including its two co-chairmen, coming from Québec civil society. The Commission gave priority to public participation in its deliberations.

Its deliberations led the Commission to make a number of important observations concerning the relationship between Québec and Canada in the wake of the failure of the Meech Lake Accord:

The conflict of visions, identities and political objectives revealed by the reactions to the 1987 Agreement is serious and restrictive for the future. It is not the prerogative of the Canadian political elite: ordinary Canadians across the country opposed the 1987 Agreement, except in Québec.

The stalemate touches upon issues relating to national identities, which enable many people to define themselves and understand their participation as well as that of the others in Canadian life.³⁵

In conjunction with these observations, the Commission raised a question fraught with consequences:

After 25 years of constitutional debate, two federal commissions of inquiry, the major constitutional

35. *Supra* note 29, pp. 38-39.

changes adopted in 1982 without Québec's consent and finally the failure of a constitutional process which, for the first time, broached the political dimension of the Québec problem from Québec's standpoint, it is reasonable to ask, at the very least, whether the rest of Canada is capable of making choices which fully satisfy Québec's own needs, aspirations and visions. Until now, such choices have been perceived or treated as being irreconcilable with other needs, aspirations and visions in Canada, or incompatible with the efficient operation of the Canadian federation.³⁶

In its conclusions, the Commission examined two possible solutions open to Québec:

Two courses are open to Québec with respect to the redefinition of its status, i.e. a new, ultimate attempt to redefine its status within the federal regime, and the attainment of sovereignty.³⁷

The Commission recommended the adoption of legislation providing for a referendum on sovereignty and the establishment of two parliamentary commissions, one responsible for analysing all questions pertaining to Québec's accession to sovereignty, and the other one responsible for examining any new offer of a constitutional partnership made by the federal government and formally binding Ottawa and the other provinces.

Following the submission of the Commission's report, the Québec National Assembly adopted the *Act respecting the process for determining the political and constitutional future of Québec* (Bill 150) calling for a referendum on sovereignty and the two commissions recommended were set up. Several months later, constitutional talks resumed and Québec Prime Minister Bourassa finally agreed to participate in them.

THE CHARLOTTETOWN ACCORD

The new talks led, in 1992, to the Charlottetown Accord, which was submitted to two simultaneous public

36. *Ibid.*, p. 39.

37. *Ibid.*, p. 73.

consultations, one in Québec and the other in the rest of Canada. In Québec, Bill 150 was amended in order to replace the referendum on sovereignty with a referendum on the new agreement.

The consultation in Québec was conducted under the *Referendum Act*, which was applied for the second time. In 1991, in response to debate in Ottawa on recourse to a Canada-wide referendum on constitutional reform, the Québec National Assembly adopted a resolution calling for respect for Québec's self-determination process:

THAT the National Assembly, while recognizing the right of the federal Parliament to pass a referendum act, ask the federal government to abide by the process established in Bill 150 and, accordingly, not to initiate a pan-Canadian referendum that would affect the political and constitutional future of Québec, thus reaffirming the right of Quebecers to assume their own destiny freely and to determine alone their political and constitutional status.³⁸

The outcome of the two referendums on the Charlottetown Accord prevented the agreement's implementation as it was rejected in Québec and in five of the other nine provinces.

According to constitutional experts Henri Brun and Guy Tremblay, rejection of the Charlottetown Accord was attributable to the collision between two conflicting visions of what Canada should be and it clearly illustrated the observation that the Commission on the Political and Constitutional Future of Québec had made several months earlier:

The causes of the rejection of the Charlottetown Accord certainly are numerous and vary from one province to the next. The complexity of the agreement and the dilution that it achieved of various constitutional demands made it highly unpalatable. But more fundamentally, the negative vote by the electorate reflected the difficulty of reconciling different visions of the country: should it be more or less centralized, and must Québec be a province like the others?³⁹

38. Québec, National Assembly, *Votes and Proceedings*, No. 167 (27 November 1991) at 1621-1622. Two other resolutions of the Québec National Assembly emphasize the importance of having Québec institutions oversee the referendum process when Québec's political and constitutional future is at stake, i.e. the resolution of May 4, 1978 (see Québec, National Assembly, *Votes and Proceedings*, No. 30 (4 May 1978) at 271); and the resolution adopted unanimously on May 21, 1997 (see Québec, National Assembly, *Votes and Proceedings and Appendices*, No. 104 (21 May 1997) at 1134).

39. Henri Brun and Guy Tremblay, *Droit constitutionnel*, 3rd edition. Cowansville: Les éditions Yvon Blais, 1997, p. 126.

1995 REFERENDUM AND SUBSEQUENT EVENTS

In 1994, a new government came to power in Québec with part of its platform aiming for a referendum on the question of Québec's accession to sovereignty. The project submitted to referendum provided that the accession to sovereignty would come after formally offering to Canada to enter into a new economic and political partnership with Québec.

The referendum was held on October 30, 1995. The outcome was close: 49.42% for the Yes side, and 50.58% for the No side. As was the case in 1980, the federal government participated actively in the referendum campaign during this third consultation on Québec's political future to be held under the *Québec Referendum Act*.

In the wake of that referendum, a number of political developments occurred touching on Québec's status. Mention should be made of the adoption by the federal Parliament of legislation governing regional vetoes on constitutional amendments. Some experts have stressed that this legislation could make it even harder to amend the Constitution through

the multilateral amending process. The federal Parliament also adopted a resolution on the concept of distinct society.

DISTINCT SOCIETY AND UNIQUE CHARACTER

On December 11, 1995, the House of Commons adopted a resolution in which the House recognizes that "Québec is a distinct society within Canada" and that this distinct society "includes its French-speaking majority, unique culture and civil law tradition,"⁴⁰ but without referring to Québec institutions. The federal government thus reiterated the definition of Québec as a distinct society proposed in the Charlottetown Accord that Quebecers rejected in the 1992 referendum and which was strongly criticized at the time.⁴¹

The resolution also invited all components of the legislative and executive branches of the federal government to take note of the recognition of the distinct society and to be guided in their conduct accordingly. This has not prevented the federal government from attempting to impose a millennium

40. Canada, *House of Commons Debates* (29 November 1995) at 16971.

41. See, in particular, Henri Brun, Ghislain Otis, Jacques-Yvan Morin, Daniel Turp, José Woehrling, Daniel Proulx, William Schabas and Pierre Patenaude, "La clause relative à la société distincte du Rapport du consensus sur la Constitution: un recul pour le Québec" in *Référendum, 26 octobre 1992. Les objections de 20 spécialistes aux offres fédérales*, Montréal: Les éditions Saint-Martin, 1992, 53-56, p. 54.

scholarship program in the education sector, which encroaches on Québec's exclusive jurisdiction and touches upon the question of financial assistance to students, an area where Québec stands out in Canada since, during the 1960s, it opted out with compensation from a Canada-wide program in order to adopt its own measures. Moreover, the federal resolution did not prevent Ottawa from concluding in February 1999, without Québec's consent, the Social Union Framework Agreement (see *infra* the section on this agreement).

The federal government has commented on the expression "people of Québec" found in the preamble of its resolution on the distinct society:⁴²

The sense in which the expression "people of Quebec" is used in the context of the resolution is that of vox populi — the people directly or through elected representatives having expressed a desire for Quebec's recognition as a distinct society within Canada. The term "people of Quebec" in this context is not used

*in the sense of an identifiable collectivity that may assert rights such as the right to self-determination.*⁴³

In the rest of Canada, the resurgence of the notion of a distinct society has hardly aroused enthusiasm. Recognition of the distinct society has undoubtedly proven to be the most controversial facet of failed attempts to bring Québec back into the constitutional fold. Among other things, a conception of the equality of the provinces leading to the rejection of any notion of special status for Québec has played a key role in opposition from the rest of Canada to such recognition.

Some have sought to find alternatives to the distinct society. Thus, the provincial premiers and territorial leaders from the rest of Canada adopted on September 14, 1997 the Calgary Declaration dealing with the "unique character" of Québec society.

The Calgary Declaration proposes a seven-point framework for discussion. One point focuses on the fundamental character for the well being of Canada of the unique character of Québec

42. The preamble reads as follows: "Whereas the People of Quebec have expressed the desire for recognition of Quebec's distinct society [...]."

43. Senator B. Alasdair Graham expressing the federal government's position on the matter, Canada, *Debates of the Senate* (5 November 1996) at 1089.

society, including its French-speaking majority, culture, and tradition of civil law.

The Calgary Declaration, which is merely political and not constitutional in nature, has been approved by the provincial legislatures, except the Québec National Assembly. However, the latter held audiences at which experts testified with regard to the Declaration. During the hearings, several experts stated that the Declaration did not satisfy Québec's traditional demands or went against them. Aside from the new dilution of recognition of Québec's status proposed therein, the experts also noted the emphasis that the Declaration's authors placed on the notion of the equality of the provinces. This principle, which the Commission on the Political and Constitutional Future of Québec regarded as one source of the conflicting views that arose in the wake of the failure of the Meech Lake Accord, continues to be a major obstacle to the establishment of a special relationship between Québec and the rest of Canada within the federal system.

Several experts felt that this emphasis on the equality of the provinces reflected a desire to circumscribe recognition of Québec's unique character and significantly limit its scope. Moreover, the Declaration, like the Charlottetown Accord rejected by Quebecers, provides a definition of the "unique character" that fails to mention Québec institutions, a key facet of the definitions of the concept of distinct society formulated in Québec.⁴⁴

Québec Prime Minister Lucien Bouchard made the following statement on September 16, 1997 on the Calgary Declaration and the question of recognition of the Québec people:

Does the document recognize the existence of the Québec people?

In my view, here we touch upon one of the saddest facets of the history of relations between Quebecers and Canadians. When observers wonder a few years from now why these two peoples were unable to continue

44. In 1980, the Québec Liberal Party noted in its constitutional program that "[i]t must be recognized that the two founding peoples of Canada are fundamentally equal and that Québec, by virtue of its language, culture and institutions, forms a distinct society within the Canadian federal system and has all the attributes of a distinct national community." [Emphasis added]. Commission constitutionnelle du Parti libéral du Québec, *Une nouvelle fédération canadienne*, 1980, p. 13. The December 1, 1981 resolution of the Québec National Assembly (*supra* note 27) — spelling out the conditions for Québec's consent to the repatriation of the Canadian Constitution — also referred to Québec institutions:

It must be recognized that the two founding peoples of Canada are fundamentally equal and that Québec, by virtue of its language, culture and institutions, forms a distinct society within the Canadian federal system and has all the attributes of a distinct national community. [Emphasis added]

to live under the same federal regime, the answer will be, above all, a lack of respect and recognition and the refusal of one of the two peoples to recognize the existence of the other.

Why is it so difficult for our Canadian neighbours to describe us in the same terms as they use to describe the other peoples of the world?

[...]

There is a deep-seated refusal among our neighbours to return the courtesy. This refusal appears to harden with the passing of each year and each decade. The stronger the Québec people becomes, the more dynamic and economically solid, the less inclined our neighbours are to recognize us.⁴⁵

THE FEDERAL GOVERNMENT'S REFERENCE ON QUÉBEC'S RIGHT TO ACCEDE TO SOVEREIGNTY

In the 1980 referendum, 40.44% of Quebecers supported sovereignty, compared with 49.42% in the 1995 referendum. This spectacular leap worried

the federal government, which attempted to sway the process in its favour by asking the Supreme Court of Canada to give an opinion on Québec's right to accede unilaterally to sovereignty should the outcome of a third referendum be positive. The Québec government refused to discuss these questions before the Supreme Court since they focus on an essentially political matter over which the courts have no jurisdiction. Quebecers alone are entitled to settle the issue in a free, democratic referendum.

In a brief submitted in February 1997 to the Supreme Court, the Attorney General of Canada claimed that Quebecers do not form a "people" and that they must be regarded as a linguistic minority within the Canadian people, which alone may enjoy the rights and privileges inherent in this status. He went on to polish his argument in an addendum to his brief by pleading that if Quebecers can claim to form a people in the sociological, historic and political sense, it can only be for the purpose of exercising their rights within the Canadian federation.

45. Notes for a Briefing by Québec Prime Minister Lucien Bouchard Following the Provincial Premiers' Meeting in Calgary, Québec City, September 16, 1997.

Claude Ryan, an influential Québec federalist, former leader of the Québec Liberal Party and former minister, responded to this claim in the expert report he filed at the request of the *amicus curiae* appointed by the Supreme Court to provide a counter-argument to that of the Attorney General of Canada. Mr. Ryan expressed himself in these terms:

The reference compels us to specify, first of all, what is meant by Québec. According to the federal government brief, Québec is a province of Canada and no more. There is only a fine line between that and saying that Québec is a province like the others. This reductionist conception has never been accepted in Québec. In the current state of law, Québec has the rank of a province but it forms within the Canadian federal system a society that is distinct because of the language and culture of the vast majority of its inhabitants, its civil law and institutions. Québec's distinct character is at the heart of constitutional debate. To define Québec, various terms have been

used, such as community, people, nation, and society. [...] Successive Québec governments for half a century, whether federalist or sovereignist, have insisted that this character be more explicitly confirmed and recognized. In the federal government brief, Québec is likened to minority "ethnic, religious or linguistic" groups within constituted States that would be denied the right to independence under international law. This line of reasoning shifts dangerously away from the concept of the equality of the two founding peoples once recognized by the federal government.

[...]

*As for the right to self-determination, interpreted as involving, among other options, the choice of sovereignty, there is a broad, profound consensus in Québec among the main political parties and most political interveners. All of them agree in recognizing that Québec's political future, regardless of the option chosen, depends, when all is said and done, on the sovereign will of the Québec people.*⁴⁶

46. Claude Ryan, "Note à l'*amicus curiae* sur la première question du Renvoi", January 31, 1998, pp. 2, 3 and 9 (notes omitted), in *Supplément à la duplique — Rapports additionnels des experts de l'*amicus curiae**, submitted to the Supreme Court of Canada in the *Reference re Secession of Quebec*.

While the Supreme Court of Canada's opinion contains some of the responses sought by the federal government, it also presents opinions that Ottawa did not expect, such as the recognition by the Court of the legitimacy of the process undertaken by Québec and the obligation to take into account the expression of the Québec people's democratic will:

*The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles [...].*⁴⁷

SOCIAL UNION FRAMEWORK AGREEMENT

At the same time as post-referendum initiatives more directly tied to the Québec question, such as the Calgary Declaration and the Supreme Court

reference, another key issue has significantly affected the Canadian federation from the standpoint of Québec's status. This question concerns the roles and responsibilities of the two orders of government in the field of social policy.

In constitutional terms, the field of social policy falls, by and large, under provincial jurisdiction. It is a field in which the federal government has, nonetheless, intervened extensively, primarily because of its financial clout. In Canada, the division of tax resources between the two orders of government is not proportional to the expenses each order of government incurs as a result of its responsibilities under the Constitution. The provinces assume most of the cost of social programs, but it is the federal government that controls most of the tax resources needed to fund the programs. This growing fiscal imbalance, resulting from the centralization of taxation during World War II, has enabled Ottawa to interfere in most fields under provincial jurisdiction.

During the 1990s, Ottawa has significantly reduced transfer payments to

47. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 88.

the provinces relating to social programs. These unilateral cutbacks led, at the request of the nine other provinces, to intergovernmental talks on social policy.

In the course of these talks, Québec has advocated its capacity to opt out, with compensation, from Canada-wide initiatives in the social field. The right to opt out was a means of reconciling the viewpoint of the English-speaking provinces, which favour the federal government's political and prescriptive role, with a view that calls for the respect of Québec's autonomy in this area, which successive Québec governments have defended.

In August 1998, during the annual provincial premiers' conference held in Saskatoon, the right to opt out with compensation that the Québec government deems essential became the focal point of a negotiating stance adopted unanimously by the provinces and territories. This position was reaffirmed at the federal-provincial meeting held on January 29, 1999 in Victoria. However, a few days later, on February 4, 1999, at the request of the federal government, the

latter and the provincial and territorial governments concluded, in Ottawa, the Social Union Framework Agreement, without the Québec government's support. While Québec was part of the interprovincial consensus on the negotiating stance with the federal government, it could not support the final agreement given the absence of a genuine right to opt out with compensation, which would have reflected the interprovincial consensus achieved the previous year. Moreover, the agreement opens the door to broader federal government control in the field of social policy, which nonetheless falls under provincial jurisdiction.

Québec was once again isolated at the conclusion of Canada-wide negotiations which, while deemed to be "administrative," presented all the aspects of a constitutional negotiation. Québec Prime Minister Lucien Bouchard emphasized at the conclusion of the negotiations that two visions of the country were once again apparent. The right to opt out with compensation, proposed by Québec as a means of reconciling these two visions,

was rejected. This situation, combined with the contents of the agreement, reveals that Québec has reached a stalemate with the rest of Canada, which is manifestly pursuing its own agenda. Joseph Facal, Québec Minister responsible for Canadian Intergovernmental Affairs, made the following observation:

What this agreement reveals is the inability of the federal government and the other provinces to reform the federal system while taking into account Québec's specific character. This agreement confirms the perception that sees the rest of Canada emerging as a State that is becoming less and less federal and more and more resolutely unitary.

In the wake of the failure of the Meech Lake and Charlottetown accords, the agreement on the social union directly calls into question Québec's place and status in Canada. The unprecedented recognition by the other provinces of the federal government's leadership role runs entirely contrary to the historic aspirations and demands of the Québec people.⁴⁸

The federal government indicated that it intends to apply the agreement as much as possible in Québec, although the latter has not signed it. It also indicated that it does not intend to pay Québec its share of funds invested in Canada-wide social initiatives should Québec refuse to comply with the conditions governing such initiatives.

More than one observer has deplored the situation created by the Social Union Framework Agreement. Commenting on it, Claude Ryan noted that:

[I]t represents the third time in the past twenty years that Quebec has been abandoned by its partners after having decided to make common cause with them.⁴⁹

According to Mr. Ryan, Québec was abandoned for the first time in 1981 during negotiations on the repatriation of the Constitution, and the second time in 1990 when the Meech Lake Accord failed.

Professor André Tremblay, a constitutional expert at the faculty of law, Université de Montréal, and a former

48. Québec, National Assembly, *Journal des débats de la Commission permanente des institutions* (28 April 1999), No. 9, p. 3.

49. Claude Ryan, "The agreement on the Canadian social union as seen by a Québec federalist," *Inroads*, June 1999, p. 27.

constitutional advisor to Québec Prime Minister Robert Bourassa, believes that the Social Union Framework sounds the death knell for an asymmetrical Canada and anything resembling special status for Québec:

The federal Constitution of Canada has been undermined by these inter-governmental manoeuvres and has shifted clearly toward centralization. The social policy field, which we have always deemed to be one of our exclusive areas of jurisdiction, has been reclassified and falls into the category of joint or shared responsibilities, with the federal government clearly predominating.

[...]

There can be no question of supporting a permanent, intrusive presence by the federal government in our fields of jurisdiction and renouncing our identity. Mr. Bouchard did not sign because the values and conceptions on which our claims are based

*are modern and reflect our fundamental interests and continue to inspire the construction of modern-day Québec.*⁵⁰

The Social Union Framework is a concrete illustration of growing, accelerated centralization in the Canadian federation, abetted by Ottawa's taxing powers, of key social and economic policies. Successive Québec governments have repeatedly denounced this fiscal imbalance in the Canadian federation. Moreover, they have demanded that Québec have at its disposal all of the tax resources necessary to fund the programs that fall under its exclusive jurisdiction. Québec has traditionally preferred to collect its own taxes instead of receiving subsidies from the federal government to fund its social programs.

50. André Tremblay, *Entente-cadre sur l'union sociale: étude sur le chapitre 5*, pp. 41-42.

CONCLUSION

The presence of two distinct national communities was a key feature of the development of Canadian institutions after the British conquest. For French Canada, Confederation in 1867 should have ensured respect for and the development of this duality. Over time, demands for equality have been formulated by French-speaking Canadians in light of their experience of the federal system and the changes in the relationship between French Canada and English Canada. Québec has sought to ensure respect for the autonomy promised by Confederation, an autonomy deemed at the time essential for the development of a French-Canadian nation within the new entity.

During the 1960s, the Quiet Revolution brought the realization that it was essential to redefine Québec's constitutional status to achieve genuine equality between the two main political communities in the

federation. As the thinking on this demand developed, the notion of a Québec people emerged.

The various attempts to renew Canadian federalism over the past 35 years have all ended with a rejection of Québec's demands and of its claims based on its specific situation. In 1982, the 1867 Constitution was substantially amended without Québec's consent. Attempts to seek redress have failed and these failures illustrate the rest of Canada's refusal to acknowledge the most basic expression of Québec's specificity. Nevertheless, the defence of the rights of the Québec people and its desire to assert itself have, little by little, come to the fore in Québec's institutional and democratic life. On the eve of the third millennium, the Québec people's quest for equality is still an important issue.